

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DONALD UBELE,)	
)	
Movant,)	
)	
v.)	Case No. CV412-136
)	CR405-012
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

REPORT AND RECOMMENDATION

The Court **VACATES** its initial Report and Recommendation in this case and substitutes the following in its place. (Doc. 2.) Donald Ubele has submitted for filing his second 28 U.S.C. § 2255 motion attacking the same 2006 conviction for firearms offenses. (Doc. 1); *see Ubele v. United States*, No. CV408-178 (S.D. Ga. May 21, 2010). Since this is a successive motion, Ubele was required to first “move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A); *see* 28 U.S.C. § 2255(h) (cross-referencing § 2244 certification requirement). In its initial Report

and Recommendation, the Court noted that he had failed to do so. In fact, he had sought permission from the court of appeals, and its order denying permission to file a second or successive motion was entered just after the Report and Recommendation had issued. *See United States v. Ubele*, No. CR405-012, doc. 142 (Eleventh Circuit denial of application for leave to file a second or successive § 2255 motion). Consequently, this case should be **DISMISSED**.¹ Since this case is dead upon arrival, Ubele's motion for appointment of counsel (doc. 4) is also **DENIED**.

Applying the Certificate of Appealability ("COA") standards set forth in *Brown v. United States*, 2009 WL 307872 at * 1-2 (S.D. Ga. Feb. 9, 2009) (unpublished), the Court discerns no COA-worthy issues at this stage of the litigation, so no COA should issue. 28 U.S.C. § 2253(c)(1); *see Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (approving *sua sponte* denial of COA before movant filed a notice of appeal). And, as there are no non-frivolous issues to raise on appeal, an appeal would not be

¹ This Court *must* dismiss second or successive petitions, without awaiting any response from the government, absent prior approval by the court of appeals. *Levert v. United States*, 280 F. App'x 936, 936 (11th Cir. 2008) (per curiam) ("Without authorization, the district court lacks jurisdiction to consider a second or successive petition."); *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997) (same); *In re Medina*, 109 F.3d 1556, 1561 (11th Cir. 1997); *Nunez v. United States*, 96 F.3d 990, 991 (7th Cir. 1996).

taken in good faith. Thus, *in forma pauperis* status on appeal should likewise be **DENIED**. 28 U.S.C. § 1915(a)(3).

SO REPORTED AND RECOMMENDED this 26th day of July, 2012.


UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA